King v New York City Health & Hosps. Corp.
2010 NY Slip Op 33967(U)
April 20, 2010
Supreme Court, New York County
Docket Number: 107231/06
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

---x

ELDENE C. KING,

Plaintiff,

Index No. 107231/06

-against-

DECISION/ORDER

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

---x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :______________________________

Papers	Numbered
Notice of Motion and Affidavits Annexed..................................	1
Notice of Cross Motion and Answering Affidavits......................	2
Replying Affidavits..	3
Exhibits..	4

Plaintiff commenced the instant action against her former employer asserting claims for retaliation. Defendant now moves for summary judgment dismissing plaintiff's retaliation claim. For the reasons set forth below, defendant's motion is granted.

The relevant facts are as follows. Plaintiff was hired by Kings County Hospital Center as a staff nurse in or about June 1988. She was eventually promoted to the position of Nurse Practitioner Grade II. In January 2003, plaintiff was working at the hospital's Healthy Women's Partnership Program ("HWPP") when she discovered that the results of pap smears and mammograms were not being reported to health care providers in a timely fashion. On January 27, 2003, plaintiff wrote a letter to her supervisor, Sheila Turner, and copied Maxine Brown,

Deputy Executive Director of the hospital and Dr. Diane Ashton, director of the HWPP, on it, stating her concerns about the failure to timely provide these test results. Plaintiff alleges that soon after writing this letter, she was treated in a hostile manner by her superiors. In or about March 2004, Dr. Ashton was replaced by Dr. Jed Cutler to lead the HWPP. Around that same time, New York State suspended the HWPP's license at King's County Hospital. Plaintiff claims that, as a result of her letter, Dr. Cutler and the Hospital's Executive Director Jean Leon refused to meet with her. Plaintiff also claims that she did not receive an annual evaluation that year or for other years, which defendant disputes. In December 2004, plaintiff wrote another letter complaining about the hospital's failure to send test results in a timely fashion, which she sent to Jean Leon. On May 6, 2005, plaintiff wrote a third letter, this time to Acting President of the New York City Health and Hospitals Corporation ("NYCHH") Alan Aviles. In this letter, plaintiff stated that she had previously alerted hospital administration to "inadequacies in areas that affected patient care adversely" and that she believed that she was being discriminated and/or retaliated against as a result. In June or July 2005, plaintiff was transferred to another clinic in the hospital , the General Women's Health Service, and not assigned Saturday hours, which she had previously worked approximately once a month. She resumed working on Saturdays in or around April 2006. Plaintiff alleges that her hours at this new position increased while her salary remained the same. However, she testified at her deposition that while her official hours were the same, she often had to stay late because of the patient load at her new assignment, but that whenever she requested she be paid overtime for these additional hours, her request was granted.

Plaintiff commenced the instant action asserting one cause of action, pursuant to New

York Civil Service Law §75-b. At some point she served an Amended Complaint, which also contained only one cause of action, this pursuant to Labor Law §741, and omitted any claim under Civil Service Law §75-b. Defendant's motion therefore seeks to dismiss only the Labor Law action. Plaintiff submitted two separate sets of opposition papers, one addressing the Civil Service Law claim and seeking leave to add a Labor Law cause of action, the other addressing the Labor Law claim only.

As an initial matter, this court will treat plaintiff as bringing only a §741 claim and defendant's motion as seeking to dismiss that claim. A claim pursuant to Labor Law §741 must be brought by instituting an action under Labor Law §740. Section 740 provides that "the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law." Labor Law §740(7). This "election of remedies" provision means that a plaintiff may not bring a claim under §741 via §740 *and* under §75-b. Moreover, the Amended Complaint, containing only the Labor Law claim, is the most recent and the Labor Law claim was the only claim addressed at oral argument. Therefore, this court will address only plaintiff's §741 claim.

Labor Law §741 provides as follows:

> (2) Notwithstanding any other provision of law, no employer shall take retaliatory action against any employee because the employee... (a) discloses or threatens to disclose to a supervisor, or to a public body, an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care...
>
> (1)(d) "Improper quality of patient care" means, with respect to patient care, any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such

violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient.

In order to make out a prima facie case of retaliation under other federal and state laws, plaintiff must prove that (1) she engaged in a "protected activity" (that is, opposed or complained about unlawful discrimination); (2) the protected activity was known to defendant; (3) defendant took an adverse employment action and; (4) there is a causal connection between the protected activity and the adverse employment action. *See Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004) (under the State and City Human Rights Laws). If plaintiff makes out a prime face case, the burden shifts to defendant to show that it had legitimate, non-retaliatory reasons for the adverse employment action. *See Williams v The City of New York*, 38 A.D.3d 238 (1st Dept 2007). The burden then shifts back to the plaintiff to show that the non-retaliatory reasons were pretextual. *See id.* Because of the scarcity of cases discussing the framework for a retaliation claim under Labor Law §741, the court will apply this framework from state and city human rights law. Under Labor Law §741, the protected activity is the disclosure or threat to disclose a practice which plaintiff reasonably believes violates a law, rule or regulation which may present a public health danger or endanger the health of a particular individual.

Plaintiff fails to establish the first element of a §741 retaliation claim that she disclosed or threatened to disclose a practice she "reasonably believed was a violation of a law, rule or regulation" to a supervisor or public body. *See* Labor Law §741; *see Deshpande v TJH Medical Services, P.C.*, 52 A.D.3d 648, 650 (2nd Dept 2008). Where plaintiff does not "allege even a good faith, reasonable belief that the appellants' conduct violated any 'law, rule, regulation or declaratory ruling adopted pursuant to law'..., he fail[s] to state a cause of action pursuant to

Labor Law §741." *Id.* Plaintiff did not identify a single statute, regulation or rule in her complaint or in her letters that she claims was violated. In her opposition papers, for the first time, she states that the hospital violated the New York State Department of Health's Clinical Guidelines, as set forth in its Cancer Services Program Operations Manual. Although there is little case law regarding what constitutes a rule or regulation pursuant to §741, this court finds that a "guideline" does not suffice. Therefore, plaintiff fails to make out the first prong of a prima facie retaliation claim that she engaged in protected activity.

However, even assuming that plaintiff did engage in a protected activity, she fails to show that defendant took an adverse employment action against her. Section 741 defines retaliatory action as "the discharge, suspension, demotion, penalization or discrimination against an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." Because there is a paucity of case law interpreting this definition, this court will analogize from the definition of an adverse employment action in the retaliation context pursuant to Title VII and to state and city human rights laws. As an initial matter, the standard for what constitutes an adverse employment action is lower for a claim for retaliation than a claim for discrimination. *See Burlington Northern & Santa Fe Railway Co. v White*, 548 U.S.53, 68 (2006); *Kessler v Westchester County Dept. of Social Services*, 461 F.3d 199, 207 (2nd Dept 2006) (citations omitted). Unlike in a discrimination case where an adverse employment action must materially affect the terms and conditions of plaintiff's employment, in a retaliation context, an adverse employment action is one which "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 548 U.S. at 68; *Kessler*, 461 F.3d at 207. Analogizing to the §741 context, an adverse employment action for these purposes

[* 6]

is one which might dissuade a reasonable worker from alleging that the health care institution at issue provided "improper quality of patient care." The United States Supreme Court has held that "normally petty slights, minor annoyances, and simple lack of good manners" will not result in deterring a reasonable worker from engaging in the protected activity. *Burlington*, 548 U.S. at 68.

In the instant case, plaintiff fails to show that her transfer, her schedule change, her exclusion from meetings and hostility from supervisors and co-workers constituted an adverse employment action. Although she preferred her work in the Women's Health clinic where she had a private office and her own patients, her transfer to a different clinic at the hospital was a lateral transfer, with the same title and pay grade, and the same hours and salary with an opportunity for overtime, which was granted whenever plaintiff filled out the appropriate paperwork. Reassignment from a position of responsibility to one with menial tasks may raise an issue of triable fact (*see Kessler*, 461 F.3d at 207-10; *Dillon v Morano*, 497 F.3d 247, 254 (2d Cir. 2007)), but "if a transfer is truly lateral and involves no significant changes in an employee's condition of employment, the fact that he employee views the transfer... negatively does not itself render the... transfer [an] adverse employment action." *Kessler*, 461 F.3d at 207 (*citing Williams v R.H. Donnelly Corp.*, 368 F.3d 123, 128 (2d Cir. 2004); *Carter v State of New York*, 151 Fed. Appx. 40 (2d Cir. 2005) (same); *Ochei v All Care/Onward Healthcare*, 2009 U.S. Dist. LEXIS 28993, * 22-23 (S.D.N.Y. 2009); *Gorgone v Capozzi*, 238 A.D.2d 308 (2nd Dept 1997) (in the Labor Law §740 context). Thus, the transfer did not constitute an adverse employment action. The changes in plaintiff's schedule which included additional hours and no Saturday work, the latter of which lasted less than a year, also did not constitute an adverse employment action. *See*

[* 7]

Williams v New York City Housing Auth., 2008 U.S. Dist LEXIS 49663 *6-7 (S.D.N.Y. 2008) (citation omitted) (a schedule change "does not rise to the level of an adverse employment action). While a schedule change may constitute an adverse employment action depending on the particular circumstances (for example, for a young mother with school-age children) (*see Burlington*, 548 U.S. at 69), in the instant case, plaintiff fails to show that changing her schedule to eliminate Saturdays worked any particular hardship on her and the increase in her hours was compensated for appropriately as plaintiff was paid overtime for any additional hours. *See Burlington*, 548 U.S. at 69. Defendant's alleged failure to review plaintiff's performance is also not the sort of action which is likely to dissuade a reasonable worker from engaging in protected activity. *See Rivera v Potter*, 2005 WL 236490 (S.D.N.Y. 2005) (failure to conduct performance reviews does not constitute adverse employment action). Although plaintiff claims that the absence of those reviews hindered her career, she does not identify any promotion or position she applied for and was denied because of her lack of annual evaluations. *See Stoner v New York City Ballet Company*, 2002 WL 523270 (S.D.N.Y. 2002) (cannot establish that failure to promote is an adverse employment action where plaintiff failed to apply for position he claims he was denied). Finally, plaintiff's claim that her supervisors acted toward her in a "hostile" manner and refused to meet with her and failed to ask her to give a presentation on breast and cervical cancer are the sort of "petty slights, minor annoyances and simple lack of good manners" which generally, and in this case, do not constitute adverse employment actions. *See Burlington*, 548 U.S. at 69.

Because plaintiff fails to make out her prima facie case, the burden never shifts to the defendant to show a legitimate, non-retaliatory reason for its actions.

[* 8]

Accordingly, defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 4/20/10

Enter: ____________
J.S.C.

CYNTHIA S. KERN
J.S.C.